IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JEROME E. LEWIS,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 03-3240-KHV**
CHARLES SIMMONS, et al.,	)	
	)	
Respondents.	)	
	)	

MEMORANDUM AND ORDER

Pursuant to 28 U.S.C. § 2254, Jerome E. Lewis seeks a writ of habeas corpus based on ineffective assistance of trial counsel, an unconstitutional sentence and errors by the state trial court and court of appeals. For reasons stated below, the Court denies the petition.

I. Procedural Background

On December 10, 1996, an assistant district attorney for Sedgwick County, Kansas filed criminal charges against Lewis for having sexual intercourse with a child under 14 years of age in violation of K.S.A. § 21-3502. See Complaint/Information in No. 96CR2312. The same day, Judge David W. Kennedy appointed the public defender to represent Lewis in the criminal proceedings. See Financial Affidavit For Court-Appointed Attorney in No. 96CR2312. Mark A. Manna, assistant public defender, represented Lewis thereafter.

On December 31, 1996, Judge Paul W. Clark held a preliminary hearing. At the beginning of the hearing, Lewis addressed the court and asked for new counsel. See Transcript Of Preliminary Hearing filed October 19, 1998 in No. 96CR2312. Lewis complained that Manna had not spent enough time with

him to prepare for the hearing, id. at 2:14-13, and requested a continuance so that he could hire another attorney, id. at 3:14-18. The court asked Manna about his preparation for the hearing and overruled Lewis's request. Id. at 3:19-4:4. Judge Clark stated that if Lewis hired another attorney and that attorney thought that a second preliminary hearing was necessary, he would grant the request. Id. 4:14-17. Judge Clark thereafter heard the alleged victim's testimony and found probable cause to believe that Lewis had committed the offense. Id. at 19:17-20. He set the matter for jury trial on March 19, 1997. Id. at 20:2-4.

On January 10 1997, over Lewis's objection, the court sustained the prosecutor's motion to require Lewis to provide samples of his blood and saliva. See Motion Minutes Sheet in No. 96CR2312; Order For Blood And Saliva Samples filed January 21, 1997 in No. 96CR2312.

On March 3, 1997, Manna filed a motion which asked the court to suppress statements which Lewis had made to law enforcement officers on December 7, 1996. See Motion To Suppress Statements in No. 96CR2312. The motion asserted that Lewis did not voluntarily and intelligently waive his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and that his statements were involuntary. See id. The same day, Manna filed a motion in limine which asked the court to preclude evidence of Lewis's prior criminal record and/or reputation for criminal activity.

In March of 1997, Manna conferred with the prosecutor's office about having DNA tests performed on Lewis's blood and saliva samples. See Transcript Of Motion proceedings on April 4, 1997, filed November 9, 1998 in No. 96CR2312 at 2:15-20. In order to allow for DNA tests by a lab in Sedgwick County, the court continued the trial date approximately one month.[1] The Sedgwick County lab

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[1] The record does not reflect who asked for a continuance, when the court ordered it, or the (continued...)

test was inconclusive because Lewis had the same blood type as the victim and the county lab could not perform the type of test required in such a case. See id. at 2:20-3:10. Upon learning this information, Lewis reversed his prior opposition to DNA tests and insisted on further testing. On April 4, 1997, Manna asked the court to continue the trial date to allow the Kansas Bureau of Investigation ("KBI") to perform additional DNA tests. Before granting the continuance, Judge Clark V. Owens II confirmed that Lewis wanted further DNA tests. Judge Clark stated as follows:

> Okay. Mr. Lewis, what this means is it is my understanding from talking with both attorneys yesterday that you have a very strong position that you want to have this DNA testing done, that in order to accomplish that you're probably going to be sitting in the county jail for several more months before we have a trial in this case. * * * The primary reason your attorney is pushing so hard for this continuance is that you really want to have this case delayed for this test to be done – is that correct – knowing that's going to mean that much longer before you're going to get to trial, you're sitting in the county jail without being able to post bond?

Id. at 3:21-4:22. Lewis responded affirmatively:

> Yeah. Well, Your Honor, the way I look at it is that, you know, this female is saying that I'm the one that committed this crime. So, the way I see it, if the DNA come back negative, the state don't have no case. So, I sit a year or two years, if I have to, to prove that.

Id. at 4:23-5:3. Judge Owens asked whether Lewis understood the possible consequences of the DNA test:

> You know if it comes back and says it is positive, that's going to be a very large nail in your coffin and in front of a jury. So, you need to understand that you won't be able to object later and say, I don't want that in front of the jury, because I asked for this test and it doesn't get to go in front of the jury, that the state gets to use it, if it's favorable to them; you get to use it, if it is favorable to you. You're rolling the dice. Do you know that?

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[1](...continued)
date to which trial was continued.

Id. at 5:4-12. Lewis responded as follows:

> The way I see it, Your Honor, is that, you know, blood and saliva was took from me from the state. You know, what I'm saying? The state took it. The lab did some kind of testing on it. They're telling me they don't have no report on what they did with it over there, which they want to take me to trial Monday, not send the blood and saliva in for DNA. Therefore, lets me know it is something about my blood and saliva that didn't, you know, please them across the street. So you know, like I said once before, I will sit here two or three years. That's what I will do.

Id. at 5:13-23.

Judge Owens speculated that in light of how a positive result would damage Lewis's case, it might be a better defense strategy to try the case without the DNA test. Id. at 5:24-6:4. Lewis responded as follows:

> Well, the way I look at it, if it is God's will for me to do 772 months or 322 months, that's what will happen. I don't put my trust in man. I put my trust in God. I'm going to roll with that. I'm going to roll the dice.

Id. at 5:5-9. Following this conversation, Judge Owens continued the trial to allow the KBI to perform further DNA tests.[2]

At the same hearing, Manna informed the court that based on Lewis's criminal history, he anticipated that if convicted, Lewis faced a presumptive sentence of 772 months. Id. at 7:8-12. Manna stated that the prosecutor had offered a plea bargain of 70 months in prison. Id. at 7:12-16. Manna further stated that based on the evidence, he had recommended that Lewis accept the plea offer but Lewis refused. Id. at 7:18-21. The prosecutor's office responded that it would make no further plea offers in the case. Id. at 7:22-8:1.

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[2] Judge Owens originally continued the trial to May 19, 1997. Although the record is not clear, the trial date was apparently later continued to July 7, 1997.

After hearing this information, Judge Owens explained to Lewis the significance of the plea offer, stating as follows:

> Mr. Lewis, you're aware this offer was made to you by the D.A.? Now, a plea bargain is a recommendation by both the state and the defense attorney to the Judge. The Judge is not required to follow it but it is still very strong recommendations [sic] to the Judge when both parties are recommending it, and there is a much higher likelihood the Judge is going to be following that recommendation when both the state and defense are making that request than when the defense only is making that request. I want to make sure you understand that you're bypassing an opportunity to have your sentence potentially cut down to 10 percent of what it otherwise would be if this case went to trial and you would be found guilty and the Court would impose the full criminal history score in this case.

Id. at 8:4-18. Lewis responded by asking for a new attorney. Specifically, he stated as follows:

> I actually haven't been getting along with this man. I don't feel he's really working in my best interests, you know what I'm saying, as far as my case, you know? I have been trying to get rid of him. I went to the Chief Public Defender, Ms. Wausage [sic]. I will file a motion to get him off my case. It isn't the point whether I did this crime or not. I need a lawyer that will stand with me and fight with me. You know what I'm saying? I look at it like this, that the state don't really got me by the, you know, to a tight vise where I feel like I have to take a plea, you know, a plea to anything, which I felt I haven't did nothing in this case. I'm not getting along with this man. I don't even like to be beside him, if it came to that point, where I want him off my case. He's smiling. I will file the motion. It is not funny. I am the guy who will have to do the 772 months. I'm not going to let this man sell me down the river.

Id. at 8:23-9:15.

Judge Owens replied that Manna was one of the nicest attorneys that he had met, so it could not be his personality with which Lewis was having a problem. Id. at 9:16-18. Judge Owens opined that the fact that Manna recommended the plea bargain did not mean that he had "jumped ship and joined the other side." Id. at 9:24-10:4. Judge Owens further stated that based on his experience, Manna would work very hard for his client in the courtroom. Id. at 10-12.

Lewis responded as follows:

> Well, I'm basically saying I anticipate [not] getting along with the man. I'm asking for new counsel period. I don't want him to be around me. * * * The only thing I'm worrying about is having somebody besides me – he wants me to to [sic] take the plea in my best interests. This man is telling me I'm guilty of this crime. That's the way I look at it. I don't want him representing me, you know what I'm saying? All I'm asking for is a new lawyer. I don't care who you give me. * * *

Id. 10:15 -11:3. Judge Owens stated that he did not find any grounds on which to grant Lewis's request, but that Lewis could file a written motion if he had additional grounds to support it. Id. at 11:20-12:12.

On May 2, 1997, Lewis filed *pro se* a motion which asked the court to replace his appointed counsel. See Motion For Replacement Of Appointed Counsel in No. 96CR2312. Lewis cited a breakdown in communication and irreconcilable conflict, stating that Manna had refused his requests to prepare in advance of the preliminary examination and ignored his list of questions to ask the victim during the examination. In addition, Lewis recounted the following events:

(1) Around February 26, 1997, Manna visited Lewis in jail and told him that the prosecutor said that he would drop the case if the DNA test came back negative. Lewis told Manna to have the DNA test done. Lewis asked for the blood and saliva test results by the county chemist, but Manna said that chemist did not have paperwork on it and that Judge Clark would not give it to him.

(2) Around March 20, 1997, another inmate, Joshua Harthaway, told Lewis that Manna had said that Lewis was in jail for having sexual intercourse with a young girl. Manna also told the inmate other information which was not the inmate's business.

(3) On March 26, 1997, Manna and deputy defender Timothy A. Frieden visited Lewis in jail. Lewis again asked for paperwork on the blood and saliva tests. Manna stated that it did not exist. Lewis asked about the preliminary hearing transcript. Manna smiled and replied that Judge Clark would

not give it to him.

(4) On April 2, 1997, Manna told Lewis that the prosecutor did not send off the blood and saliva samples like he was supposed to,[3] and that they were still going to trial on April 7. Lewis asked what the defense would be and Manna had no answer.

(5) On April 4, 1997, Lewis had to ask Judge Owens for extra time to have DNA tests performed. If Manna had sent the samples off like Lewis had requested, Lewis would not have had to waive his right to a speedy trial.

(6) On April 22, 1997, Lewis asked Manna to provide a list of all the people whom Lewis had asked him to subpoena and stated that he had a right to cross examine everyone involved for credibility. Lewis also asked for a transcript of the preliminary hearing. Manna responded that he – and not Lewis – would decide who to call at trial and that if Lewis wanted to use his own strategy, he should represent himself. Manna stated that his defense strategy did not require the preliminary hearing transcript and that if Lewis wanted a copy, he could pay for it himself.

For unknown reasons, the trial court did not rule on Lewis's written motion to change counsel.

On June 27, 1997, the court held a hearing on Lewis's motion to suppress statements. See Transcript Of Motion filed November 9, 1998 in No. 96CR2312. The court heard evidence regarding surrounding circumstances and found that Lewis had knowingly and voluntarily made the statements in question. It therefore overruled the motion to suppress. See id. at 33.

On July 7, 1997, Judge Tom Malone called the case for trial. The judge heard oral argument on

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[3] The record is unclear whether the prosecutor was supposed to send off the samples, and if so, where he was supposed to send them.

– and sustained – defendant's motion in limine regarding evidence of Lewis's prior criminal activity. See Motions And Guilty Plea filed April 8, 1998 in No. 96CR2312 at 2-11. The court then took a recess to wait for the jury to arrive. Id. at 11. After the recess, the attorneys informed the court that due to a change in DNA test results, Lewis wanted to enter a plea of guilty. Id. at 12:6-9.

The report of the KBI chemist, Kelly Robbins, had originally concluded that no statement could be made as to who contributed the semen to the alleged victim. Id. at 13:5-7. On the morning of trial, however, Robbins faxed the prosecutor a report which changed that conclusion and stated that Lewis could be included as a possible donor. Id. at 8-11; 12:14-18. At 9:10 a.m., the prosecutor shared the revised report with Manna. They then had a telephone conference to review the findings with Robbins. Id. at 12:19-25. Robbins told them that while that reviewing her results previous day, she compared a different sample and came to a different conclusion. Id. at 8-11; 12:25-13:5. After Lewis learned this information, he decided to plead guilty. Id. at 13:11-16.

The court accepted defendant's plea of guilty. See id. at 14-21. In doing so, the court asked Lewis whether he had had adequate time to discuss the matter with his attorney and whether he was satisfied with the services of his attorney. Id. at 19:9-13. Lewis answered both questions affirmatively. Id. at 19:11, 19:14. Lewis also admitted that he had had sexual intercourse with the victim. Id. at 20:12-20.

Defendant's presentence investigation report, which was filed on August 5, 1997, reflected a criminal history category of "B" based on two person felonies and one non-person felony.[4] See

[4] Although the record is not clear, it appears that the prior crimes included residential (continued...)

Presentence Investigation Report in No. 96CR2312. The report indicated a sentencing range from 692 to 772 months in prison. Id.

In August of 1997, attorney Douglas Adams began to represent Lewis.[5] On August 20, 1997, on behalf of Lewis, Adams filed a motion to withdraw the guilty plea. See Motion To Withdraw Plea in No. 96CR2312. The motion stated that Lewis was not guilty and that he had entered the plea under duress after learning immediately before trial that new DNA test results linked him to the crime. The motion also stated that Manna should have requested a trial continuance to determine the value of such evidence and whether a defense expert should examine the new report. Adams also filed a motion for a downward sentencing departure. See Motion For Sentencing Departure filed August 20, 1997 in No. 96CR2312. The motion argued that defendant's prior crimes were dissimilar to the current crime and that the presumptive sentence was disproportionate to the harm inflicted. It further stated that although the victim was 13 years old, she held herself out to be much older and consented to sexual intercourse. Finally, Adams objected to defendant's criminal history because the prosecutor had not verified the past crimes with certified journal entries. See Objection To Criminal History filed August 20, 1997 in No. 96CR2312.

On September 5, 1997, the court held a hearing on Lewis's motion to withdraw his plea. See transcript of Motion To Withdraw Plea filed April 8, 1998. Lewis testified that on the morning of trial, after

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[4](...continued)
burglary in 1985, robbery in 1990 and criminal possession of a firearm in 1998. See Transcript Of Sentencing[,] Objection To Criminal History [and] Motion To Depart filed May 18, 1998 in No. 96CR2312 at 2:23-3:4; 4:15-22; 18:8-14.

[5] The circumstances surrounding the change in counsel are not clear. Manna testified that on August 15, 1997, his office asked Adams to represent Lewis after it received a request from Lewis to file a motion to withdraw his plea based on coercion by counsel. See transcript of Motion To Withdraw Plea filed April 8, 1998 in No. 96CR2312 at 77:16-78:6.

learning of the new DNA test results, Manna had advised him that his best option was to plead guilty. Id. at 5:20-6:2. Lewis stated that Manna did not mention the option of seeking a continuance and having a defense expert examine the DNA test results. Id. at 6:10-17. Lewis further testified that he did not complain about his attorney's performance during the plea proceeding because his previous complaints had fallen on deaf ears. Id. at 12:13-13:3. Lewis admitted that at an unspecified time, he had met with Timothy Frieden, deputy public defender; that Frieden had offered to assign Lewis another lawyer in the public defender's office; and that he had declined. Id. at 7:1-5, 28:8-21.

Brad Sylvester, a criminal defense attorney, testified for defendant that in his experience, defense counsel should have an expert look at the damaging DNA test results to verify the type of fragments being used and whether the autorad accurately showed a match. Id. at 39:7-22.

Manna testified that he did not suggest a continuance because he did not think that it was necessary. Id. at 73:22-74:3. Manna stated that he and Lewis had already discussed the contingencies. Id. at 74:3-11. Specifically, Manna stated as follows:

> We had already discussed DNA, we had discussed testing it. We had discussed using our own expert; we had decided against that. We had discussed submitting it to the K.B.I. We had continued this case several times up to the time of trial for that testing. We had discussed that if the results came back that included him as a donor that it would be detrimental; we had discussed how that would affect his case at trial. This had been discussed many times before.

Id.

In addition to testimony by Lewis, Sylvester and Manna, Adams presented newly discovered evidence which consisted of a letter in which the victim changed her statement. See id. at 89:15-90:11. At the preliminary hearing, the victim had identified Lewis as the individual with whom she had had sex and

she did not mention having sex with any other individuals. In the newly discovered letter, the victim stated that in addition to Lewis, she had sex with at least five or six other individuals at the time in question. Id.

After hearing the evidence, the court ruled that Manna had provided effective assistance of counsel. Id. at 97:98:2199:11. The judge criticized the fact that Manna did not discuss the possibility of a continuance to have an independent expert evaluate the DNA test results, but he found that the totality of circumstances did not rise to the level of ineffective assistance of counsel. Id. at 99:3-10. The judge also found that the evidence did not support a finding that Lewis made the plea under duress. See id. at 99:12-102:8. As to newly discovered evidence, the judge found that the letter did not exculpate defendant. Id. at 103:21-25. The judge also concluded that the cumulative effect of these events did not warrant setting aside the guilty plea. Id. at 105.

On September 10, 1997, the court held a sentencing hearing. See Transcript Of Sentencing[,] Objection To Criminal History [and] Motion To Depart filed May 18, 1998 in No. 96CR2312. The court overruled defendant's objection to criminal history and found that he had a criminal history of "B." See id. at 5:18. The court also overruled defendant's request for a downward departure. Id. at 28:16-19. The judge noted that the sentencing guidelines prescribed a sentence of 692 months to 772 months, with a mid range of 732 months, id. at 28:2-5. He sentenced Lewis to the low end, at 692 months. Id. at 33:20-23.

Lewis appealed, arguing that the trial court erred in (1) not appointing new counsel; (2) not letting him withdraw his plea of guilty; (3) not considering evidence of the prior plea offer (70 months in custody) in denying his motion for a downward sentencing departure; and (4) imposing a sentence which violated the Eighth Amendment to the United States Constitution and Section 9 of the Kansas Constitution Bill of Rights. See Brief Of Appellant in No. 98-80822-A. On March 3, 2000, the Kansas Court of Appeals

affirmed defendant's conviction, finding that the trial court had not abused its discretion in failing to appoint new counsel and refusing to let Lewis withdraw his guilty plea. See State of Kan. v. Lewis, 27 Kan. App.2d 134, 135-40, 998 P.2d 1141, 1144-46 (Kan. App. 2000). As to the remaining issues, the Kansas Court of Appeals found that it did not have jurisdiction to consider a direct appeal challenging a presumptive sentence and noted that Lewis could challenge the constitutionality of his sentence in a post-sentence collateral attack. See id., 27 Kan. App.2d at 141-42, 998 P.2d at 1146-47. The Kansas Supreme Court denied review.

On May 25, 2001, in the district court for Sedgwick County, Kansas, Lewis filed a motion for post-conviction relief under K.S.A. § 60-1507. See No. 01C1630. He asserted (1) that trial counsel was ineffective; (2) that the trial court did not advise him of his rights before taking the plea; (3) that the trial judge wrongfully withheld information at the hearing on the motion to withdraw his plea; (4) that the trial court imposed an illegal sentence; (5) that the trial court denied him counsel at his arraignment; and (6) that the sentencing judge demonstrated prejudice against him. See Motion in 01C1630. On November 6, 2001, the district court denied the motion. See Order Denying Relief Pursuant To K.S.A. 60-1507 in No. 01C1630. Lewis appealed to the Kansas Court of Appeals, which affirmed the denial of relief. See Memorandum Opinion in No. 88,163. Lewis did not seek review by the Kansas Supreme Court.[6]

On June 2, 2003, Lewis filed a *pro se* petition for writ of habeas corpus in this Court, asserting the

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[6] In his petition for habeas corpus review, Lewis states that his attorney filed an untimely petition for review by the Kansas Supreme Court. See Doc. #1 at 3. He further states that he is claiming a "miscarriage of justice." Id. The record does not reflect that *any* petition for review was filed – timely or untimely – in the Kansas Supreme Court. Lewis apparently does not claim ineffective assistance of counsel with respect to the alleged late filing.

following grounds for relief: (1) Adams provided ineffective assistance of counsel at the hearing on the motion to withdraw the guilty plea when he advised Lewis to waive his attorney-client privilege with regard to Manna; (2) the trial judge applied the wrong standard in ruling on his motion to withdraw the guilty plea; (3) the trial court erred in refusing to let him withdraw his guilty plea because of ineffective assistance by Manna; (4) the Kansas Court of Appeals erred in holding that K.S.A. § 21-4721 precludes judicial review of a constitutional challenge to a sentence within the sentencing guidelines; (5) his sentence violates the Eighth Amendment to the United States Constitution and Section 9 of the Kansas Constitution Bill of Rights; (6) in overruling his motion for a downward sentencing departure, the trial court erred in refusing to consider relevant, trustworthy and reliable evidence; and (7) the trial court imposed an illegal sentence. See Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2254 ("Section 2254 Petition") (Doc. #1) filed in No. 03-3240-KHV.[7]

II. Legal Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2255 (incorporating 28 U.S.C. § 2244), governs the Court's review in this case. See Paxton v. Ward, 199 F.3d 1197, 1204 (10th Cir. 1999) (AEDPA applies to habeas petitions filed after April 24, 1996, regardless of date of criminal trial forming basis of conviction). Under Section 2254, as amended by the AEDPA, the Court may not issue a writ of habeas corpus with respect to any claim which the state court adjudicated on the merits unless that adjudication resulted in a decision:

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[7] Lewis raises these issues in his petition for habeas relief but provides no argument in support of any of them. See id. He has not responded to the answer and return (Doc. #14) which defendants filed March 18, 2004.

> (1) . . . that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) . . . that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d)(1)-(2). Under the "contrary to" clause, the Court may issue a writ of habeas corpus only if (1) the state court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law, or (2) the state court decided the case differently than the Supreme Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, the Court may grant habeas relief if the state court "correctly identifie[d] the governing legal rule but applie[d] it unreasonably to the facts of a prisoner's case." Id. at 407-08. The Court may not issue a writ simply because it concludes, in its independent judgment, that the state court applied clearly established federal law erroneously or incorrectly; rather the application must be objectively unreasonable. Id. at 409-11.

IV. Analysis

A. Ineffective Assistance Of Counsel By Adams

Lewis contends that Adams provided ineffective assistance at the hearing on the motion to withdraw his guilty plea, by advising him to waive his attorney-client privilege with regard to Manna. In deciding the appeal of the district court denial of the motion for post-conviction relief, the Kansas Court of Appeals rejected this argument. See Memorandum Opinion in No. 88,163 at 11. Lewis did not seek review from the Kansas Supreme Court. A habeas petitioner is generally required to exhaust state remedies whether his action is brought under Section 2241 or Section 2254. Montez v. McKinna, 208 F.3d 862, 866 (10th Cir. 2000); see also O'Sullivan v. Boerckel, 526 U.S. 838, 842-45 (1999) (when

prisoner alleges state conviction violates federal law, state courts must have full opportunity to review claim prior to prisoner seeking federal relief). Lewis has therefore failed to exhaust his state court remedies, which constitutes procedural default. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991) (procedural default exists where petitioner fails to exhaust state remedies and court to which petitioner would be required to present claims in order to meet exhaustion requirement would now find claims procedurally barred); Dulin v. Cook, 957 F.2d 758, 759 (10th Cir. 1992) (same).[8] Generally, federal habeas corpus review of defaulted issues is precluded "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

Lewis asserts that the court should apply a "miscarriage of justice" standard. Section 2254 Petition at 5. The miscarriage of justice exception is extremely narrow and arises only "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Phillips v. Ferguson, 182 F.3d 769, 774 (10th Cir. 1999) (quotation and citation omitted). Lewis has made no showing of actual innocence. The Court therefore denies habeas relief based on ineffective assistance by Adams.

B. Withdrawal of Guilty Plea/Ineffective Assistance of Counsel By Manna

Lewis maintains that the trial court should have let him withdraw his plea because of ineffective assistance by Manna. The Kansas Court of Appeals rejected this argument on direct appeal of defendant's case. In deciding whether to set aside defendant's guilty plea, it applied the following two-prong test: (1) whether counsel's performance fell below the standard of reasonableness; and (2) whether a reasonable

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[8] Pursuant to Kan. Sup. Ct. R. 8.03(a)(1), a party must file his petition to appeal a decision from the Kansas Court of Appeals within 30 days after the date of decision.

probability exists that but for counsel's errors, Lewis would not have pled guilty and would have insisted on going to trial. See Lewis, 27 Kan. App.2d at 138, 998 P.2d at 1145 (citing State v. Solomon, 257 Kan. 212, 223, 891 P.2d 407 (1995)). The Kansas Court of Appeals decided the merits of Lewis's claim under correct federal legal standards, see Strickland v. Washington, 466 U.S. 668, 687 (1984); Braun v. Ward, 190 F.3d 1181, 1188-89 (10th Cir. 1999),[9] and the Kansas Supreme Court denied Lewis's petition for review of his direct appeal. Lewis has therefore exhausted his state court remedies on this claim, and this Court must determine whether the Kansas Court of Appeals unreasonably applied federal legal standards.

As to the first prong, the Kansas Court of Appeals determined that even though Manna did not suggest a continuance, his performance did not fall below the standard of reasonableness under the totality of circumstances. See Lewis, 27 Kan. App.2d at 138-39, 998 P.2d at 1145-46. In so holding, it noted Manna's testimony that he and Lewis had chosen the DNA expert from the KBI because the results would be trustworthy, and that he and Lewis had discussed the fact that if the results came back against him, it would be detrimental to his case. Id. The record fully supports these findings, and determination of the Court of Appeals was not unreasonable.

As to the second prong, the Kansas Court of Appeals concluded that under the circumstances, the record did not demonstrate a reasonable probability that Lewis would have insisted on going to trial if Manna had advised him of the possibility of having another expert examine the DNA test results. See id.,

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[9] In Braun, the Tenth Circuit Court of Appeals found that petitioner must also show that had he rejected the plea, the outcome of the proceedings would have likely changed. Id. at 1188. The Kansas Court of Appeals did not articulate this prong of the test but the omission is immaterial in light of the fact that it found against Lewis on the first two prongs.

27 Kan. App.2d at 139-40, 998 P.2d at 1146. Again, the record supports this conclusion. Lewis presented no evidence that if counsel had requested a continuance the trial judge would have granted it, or that the outcome would have been different if a continuance had been granted. Because the Kansas Court of Appeals correctly applied federal law, federal habeas relief is not warranted.

C. Alleged Errors By Trial Court

Lewis contends that the trial court erred by (1) applying the wrong standard in ruling on his motion to withdraw the plea; (2) refusing to consider relevant, trustworthy and reliable evidence in support of his motion for a downward sentencing departure; and (3) imposing an illegal sentence. In deciding the appeal on the motion for post-conviction relief, the Kansas Court of Appeals rejected the first and third arguments. See Memorandum Opinion in No. 88,163 at 7-8, 12. Lewis did not seek further review from the Kansas Supreme Court, and these claims are therefore in procedural default. Lewis urges the court to apply the "miscarriage of justice" standard, see Section 2254 Petition at 6, but he has not shown actual innocence. See Coleman, 501 U.S. at 750. He therefore is not entitled to federal habeas relief.

With respect to the second argument, Lewis asserted on direct appeal that in denying his motion for a downward departure, the trial court violated Kansas law by not considering evidence of the prior plea offer (70 months in prison). See Brief Of Appellant in No. 98-80822-A at 16-20. Claims of state law violations are not cognizable in federal habeas actions. Montez v. McKinna, 208 F.3d 862, 865 (10th Cir. 2000); 28 U.S.C. § 2254(a). The Court therefore denies relief based on this ground.

C. Alleged Error By Kansas Court Of Appeals

Lewis asserts that the Kansas Court of Appeals erred in holding that K.S.A. § 21-4721 precludes judicial review of a constitutional challenge to a sentence within the sentencing guidelines. Lewis appears

to challenge the Kansas court's interpretation of Kansas law, which is not cognizable in this action. See Montez, 208 F.3d at 865. Moreover, the Kansas Court of Appeals found only that Lewis could not challenge the constitutionality of the sentence on direct appeal, not that he could not challenge it at all. See Lewis, 27 Kan. App.2d at 142, 998 P.2d at 1147 (Lewis must raise constitutionality of sentence by collateral attack). The Court therefore denies relief on this argument.

B. Unconstitutional Sentence

Lewis maintains that his sentence violates the Eighth Amendment to the United States Constitution and Section 9 of the Kansas Constitution Bill of Rights. In deciding the appeal on the motion for post-conviction relief, the Kansas Court of Appeals rejected this argument. See Memorandum Opinion in 88,163 at 11-12. Because Lewis did not appeal to the Kansas Supreme Court, he has procedurally defaulted this claim. The Court therefore denies relief on this ground.

IT IS THEREFORE ORDERED that the petition for habeas corpus pursuant to 28 U.S.C. § 2254 be and hereby is **DENIED.**

Dated this 29th day of December, 2004 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge